IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

DONALD J. MACFARLANE,
Petitioner,

vs.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF.

PROCEEDINGS IN THE COURTS BELOW.

The petitioner for the Writ of Certiorari, Donald J. MacFarlane (Tr. 1-6), brought an action to recover benefits under the provisions of an accident and health insurance policy issued by the respondent, Pacific Mutual Life Insurance Company, in the Circuit Court for Rock County, State of Wisconsin (Tr. 1). The action was removed from the Circuit Court of Rock County to the District Court for the Western District of Wisconsin, because of diversity of citizenship, on December 14, 1948 (Tr. 1).

called for his children at school and took them home; drove to the bank at Janesville to make deposits by having someone deposit the money in the bank after he arrived at the bank (Tr. 20). Also, during the month of June, 1947, and thereafter, he made trips to Janesville to call on his physician. These trips he made either alone or, at times, accompanied by one of his children. Arriving at the doctor's office, he would park his car between the sidewalk and the rear of the building in which the doctor had his office, and either attracted the doctor's attention by blowing the horn when alone, or when accompanied by one of his own children he would send the child in to tell the doctor of his presence (Tr. 20). During the month of July, 1947, he made trips to Janesville on a number of occasions, either for pleasure or for pleasure and business, or for the accommodation of his family (Tr. 20). Since June 6, 1947, when he obtained his Oldsmobile, he used this automobile as much as three or four times a day for the purpose of driving his children, on pleasure trips, and also using it for business trips (Tr. 22).

On a sickness form executed by the petitioner under date of June 7, 1947, and by his doctor, Joseph F. Kelly, in May of 1947, the respondent was notified, in writing, by petitioner that he first left the house for any reason whatsoever on May 8, 1947 (Tr. 15), and the respondent was notified by Dr. Kelly, in writing, that the petitioner was necessarily continuously confined inside the house from September 14, 1946, to May 8, 1947 (Tr. 16). The same information was given on a sickness form executed by the petitioner under date of August 6, 1947 (Tr. 16), and by his doctor under date of August 4, 1947 (Tr. 17).

In addition to the activities engaged in by the petitioner from and after May 8, 1947, as stated heretofore, the petitioner made numerous and extended trips from his home

to cities in Wisconsin, Minnesota, Illinois, Ohio, Pennsylvania, New York, and Florida, either by automobile, train, or airplane, which trips were for either pleasure, pleasure and business, attending conventions or visiting with relatives and friends, and for medical treatment and rehabilitation (Tr. 20-47). Petitioner attends church regularly (Tr. 48). Petitioner is able to get out of his house only when he has braces on his legs (Tr. 44) and by either the use of crutches (Tr. 44) or "Sister Kenny sticks" (Tr. 44-45) or his wheelchair (Tr. 44).

The Trial Court took notice of the necessity of Petitioner's use of braces and wheelchair, stating (Tr. 44):

> "I know he is wearing braces. I know he is in here now on a wheelchair. I know he couldn't walk without those braces."

At the trial, it was stipulated that the petitioner was at that time necessarily and continuously disabled and prevented from performing every duty pertaining to his occupation (Tr. 18) within the meaning of the disability clause in the policy.

SUMMARY OF ARGUMENT.

The Court of Appeals decided a substantial question of state law in accordance with the test laid down by the local decisions of the Supreme Court of the State of Wisconsin in holding that the petitioner, although he had a permanent and total physical disability to his legs, and was able and had, on innumerous occasions, left his house using braces on his legs and using either crutches, "Sister Kenny sticks", or a wheel chair, and was NOT house confined" within the meaning of the "house confinement" provisions in the policy issued by the respondent 7

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ARGUMENT.

The Court of Appeals decided a substantial question of state law in accordance with the test laid down by the local decisions of the Supreme Court of the State of Wisconsin in holding that the petitioner, although he had a permanent and total physical disability to his legs, and was able to and had, on innumerable occasions, left his house using braces on his legs and using either crutches, "Sister Kenny sticks", or a wheel chair, was not "house confined" within the meaning of the "house confinement" provisions in the policy issued by the respondent.

The policy provisions pertinent in this case provide for $200.00 monthly sickness benefits (Tr. 3, 61) during house confinement (Tr. 4, 62), providing the following three conditions concur during the period throughout which the insured is by reason of sickness (quoting from the policy) (Tr. 62):

1. " * * * wholly, necessarily and continuously disabled and prevented from performing every duty pertaining to his occupation."
2. " * * * is necessarily, strictly and continuously confined *within* the house." (Italics supplied.)
3. " * * * and *therein* regularly visited and attended by a legally qualified physician or surgeon other than himself." (Italics supplied.)

The monthly indemnity is payable for a lifetime if the insured should be house confined for life under the three concurring conditions set forth above.

However, if house confinement ends, then the same monthly indemnity of $200.00 is payable for a period of

non-house confinement not exceeding three (3) months (Tr. 62), providing the following two conditions concur when the insured is by reason sickness (quoting from the policy) (Tr. 62):

> 1. "* * * wholly, necessarily, and continuously disabled and prevented from performing every duty pertaining to his occupation."
>
> 2. "* * * is necessarily under the regular care and attendance of a legally qualified physician or surgeon other than himself." (Tr. 62.)

In *Reeves* v. *Midland Casualty Co.*, 170 Wis. 370, 371, the policy issued to *Reeves* provided for full indemnity

> "* * * for the period during which the insured shall be necessarily and continuously confined *within* the house and *therein* regularly and personally visited by a legally qualified physician, and wholly and continuously disabled and prevented from performing any and every duty pertaining to any business or occupation solely by reason of such illness." (Italics supplied.)

The policy also provided for one-half (½) the full indemnity

> "* * * for the period not exceeding two consecutive months immediately following said confinement, or by reason of non-confining illness, during which the insured shall be regularly and personally attended by such physician, and wholly and continuously disabled and prevented from performing any and every duty pertaining to any business or occupation."

In *Buske* v. *Federal Casualty Co.*, 200 Wis. 18, the policy issued to Buske provided for full indemnity

> "* * * for the period during which the insured shall be necessarily and continuously confined *within* the house and *therein* regularly and personally visited by a legally qualified physician, and wholly and continu-

ously disabled and prevented from performing any and every duty pertaining to his business or occupation * * *." (Italics supplied.)

The policy also provided for one-half (½) the full indemnity

"* * * for the period not exceeding three consecutive months immediately following said confinement, or by reason of non-confining illness, during which the insured shall be regularly and personally attended by such physician, and wholly and continuously disabled and prevented from performing any and every duty pertaining to his business or occupation * * *."

The "house confinement" provision in the policies in both the *Reeves* and *Buske* cases is, for all practical purposes, identical with the language contained in the policy issued by the respondent to the petitioner. Consequently, the interpretation and construction of the language in the *Reeves* and *Buske* cases by the Supreme Court of Wisconsin controls the interpretation and construction of the language in the respondent's policy here involved.

The question before the Supreme Court of Wisconsin in the *Reeves* case was this:

> Was the insured confined *within* the house and *therein* regularly and personally visited and attended by his physician when the proofs established that Reeves was able to sit on his porch a great deal and frequently drove to the doctor's office, a distance of four miles, to be treated.

The Trial Court, in the *Reeves* case, had instructed the jury as follows (page 373 of the decision):

> "I instruct you that the phrase 'necessarily and continuously confined within the house' means such time as plaintiff was confined within the house, and for such time as plaintiff was disabled by reason of his sickness from departing from his house *for the purpose of attending to the ordinary affairs of life and*

> *to resume the ordinary pleasures thereof,* including the times he may be assisted to the porch of his house to enjoy the benefits of fresh air and sunshine as directed by his physician."

It should be noted that in that case there was evidence that Reeves was *assisted* to the porch of his house to enjoy the benefits of fresh air and sunshine, as directed by his physician. The Supreme Court of Wisconsin, however, held the instruction erroneous and characterized the interpretation of the policy by the Trial Court as a liberal construction.

In interpreting the "house confinement" provisions of the policy in the *Reeves* case, the Supreme Court of Wisconsin stated at pages 373-374 of the *Reeves* decision:

> "It is a familiar rule that in case of doubt or ambiguity the language of an insurance policy should be construed most strongly against the insurer (*Patterson* v. *Natural Premium M. L. Ins. Co.,* 100 Wis. 118, 75 N. W. 980), but it is also well settled that construction cannot be resorted to unless ambiguity exists. Under the terms of the policy the insured was entitled to full indemnity only for the period during which he was necessarily and continuously confined *within* the house and *therein* regularly and personally visited by a legally qualified physician. It would seem that the company *ex industria* employed language which could leave no doubt as to the period during which the insured should be entitled to full indemnity. He must not only be confined *within* the house but he must be *therein* regularly and personally treated by a physician. Treatment at the physician's office was excluded as plainly and as definitely as it well could be. We speculate in vain for language that would more surely limit the period during which the insured was entitled to full indemnity to that period during which he was confined within the four walls of his house and regularly and personally treated by a physician therein. To our minds the language em-

ployed is not capable of a double meaning. It cannot be reasonably construed to include time around the house, about the house, or when he was making trips to Polar and receiving treatment in the physician's office."

In *Buske* v. *Federal Casualty Co.*, 200 Wis. 18, the Supreme Court of Wisconsin stated at page 20:

> "An exactly similar policy was construed in *Reeves* v. *Midland Casualty Co.*, 170 Wis. 370, 174 N. W. 475, and it was there held that in order to entitle the insured to recover full indemnity, necessary and continuous confinement *within the four walls of the house* was required. It was there pointed out that the policy itself prescribed two degrees of illness, and that full indemnity could be recovered only during the time that the insured was necessarily and continuously confined *within the four walls of the house* and therein regularly attended by a physician. The classification thus attempted is of degrees of sickness, and the confinement therein referred to is, plainly, confinement induced by the character and degree of sickness; a physical incapacity to leave the house resulting directly from the sickness." (Italics supplied.)

The Trial Court, having found (Tr. 67) that the petitioner "was at all times between September 14, 1946, and August 7, 1947,

> "'* * * wholly, necessarily and continuously disabled and prevented from performing every duty pertaining to his occupation'."

determined that the first condition in both the "house confinement" and "non-house confinement" provisions of the policy had been satisfied.

In regard to the second condition of the "house-confinement" policy provision, the Trial Court found (Tr. 64) that the petitioner, after May 8, 1947:

> "* * * was no longer necessarily, strictly and

continuously confined with the house and therein regularly visited and attended by a legally qualified physician or surgeon other than himself." (Tr. 64.)

In regard to the third condition, namely, medical treatment within the house, the Trial Court found (Tr. 67):

"* * * plaintiff was not 'regularly visited and attended by a legally qualified physician or surgeon' at his home beginning May 8, 1947."

As one of the conclusions of fact, the Trial Court further found (Tr. 66) that:

"The house confinement having ended on May 7, 1947, payments made by the defendant to and including May 7, 1947, discharged the defendant's liability for house confinement indemnity under Part I, subsection (a) of the sickness benefit provision of the policy, and payments made thereafter from May 8, 1947, to and including July 21, 1947, discharged the non-house confinement, three months' income indemnity under Part I, subsection (b) of the sickness benefit provisions of the policy to and including July 21, 1947, leaving unpaid the balance of the three-month period from and including July 22, 1947, to and including August 7, 1947."

The above quoted findings of the Trial Court were made in the face of the further finding (Tr. 66-67) that:

"The plaintiff is permanently physically disabled in that both of his legs are paralyzed; he cannot move about or out of his home *without the help of others* or *without artificial aids*, and would be confined to his home if such assistance were not available." (Italics supplied.)

The Court of Appeals, in its decision (Tr. 74-79) did not question the findings of fact of the Trial Court, for the obvious reason that its findings of fact were fully sustained by substantial evidence. The Court of Appeals,

having accepted the findings of the Trial Court as conclusive, stated the issue before it as follows:

"The principal issue is whether plaintiff since May 8, 1947, was 'confined within the house' as that term is used in the policy. In this connection, it should be noted that the Court not only found that plaintiff was and continues to be totally disabled but further that 'he cannot move about or out of his home without the help of others or without artificial aids, and would be confined to his home if such assistance were not available.'

"Plaintiff makes an appealing argument, not entirely without reason and logic, that a liberal construction of the policy, to which he is entitled, requires a holding that he was and is house confined. This argument rests on the premise that plaintiff because of his illness was without the physical ability to leave the house on his own, that is, that he was unable to do so without assistance and without the aids which he employed.

"The District Court having aquired jurisdiction of the case by reason of diversity of citizenship, the law of the State of Wisconsin is controlling. Two decisions of the Supreme Court of that state are relied upon by the defendant as squarely in point. (*Reeves* v. *Midland Casualty Co.*, 170 Wis. 370, and *Buske* v. *Federal Casualty Co.*, 200 Wis. 18.) And while the record does not specifically show, we assume that the District Court in deciding the issues adversely to the plaintiff agreed with the defendant. *After giving these cases careful study, we think there is no escape from such a conclusion.*

"In each of these cases, the Court had before it a health and accident policy and construed a provision almost identical with that here under consideration.

"* * * It is true, of course, that the facts of these cases are different from those of the instant case, and the plaintiff intimates that if the facts of the present case were before the Wisconsin Court, it might reach a different result. *But we are not per-*

mitted to speculate on what the Wisconsin Court might hold in some future case. It has quite definitely construed the provision in question and we see no escape from its binding effect. (Italics supplied.)

"Moreover, the Court found that commencing and after May 8, 1947, plaintiff was not at his house 'regularly visited and attended by a legally qualified physician or surgeon'. This finding, under the holding in the *Reeves* case (heretofore quoted), would present an additional obstacle to plaintiff's right to recover.

"* * * In concluding, we cannot resist the temptation to express our admiration for the remarkable courage and ingenuity displayed by the plaintiff in an attempt at rehabilitation. His rights, however, as well as those of the defendant, must be determined by the contract which the parties made *as it has been construed by the State Court.*" (Italics supplied.)

Thus it appears conclusively that the Court of Appeals did apply the tests laid down by the Supreme Court of the State of Wisconsin in the *Reeves* and *Buske* cases.

Conclusion.

For the reasons stated herein, it is respectfully submitted that the petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
MAR 26 1952
CHARLES ELMORE CROPLEY
CLERK

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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